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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 24 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Petitions Regarding DIRECTV's DBS)
Service to the States of Alaska and Hawaii)

MB Docket No. 03-82
TB Docket No. 98-21

OPPOSITION OF DIRECTV, INC.

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DIRECTV, Inc. ("DIRECTV") hereby opposes the Petition for Administrative Sanctions filed by the State of Hawaii ("Hawaii Petition") and two Requests for Declaratory Ruling filed by Microcom, an Alaskan DBS dealer.² DIRECTV respectfully requests that these petitions be denied,

I. INTRODUCTION AND SUMMARY

The State of Hawaii ("Hawaii") has filed yet another dyspeptic pleading – this time styled as a "Petition for Administrative Sanctions" – asserting that, despite "more than eight years of growth," DIRECTV has "continually and willfully refused to comply with the Commission's geographic service rules" and "ignored repeated Commission orders reminding DIRECTV of its geographic service obligations."³ Hawaii then proceeds to make identical arguments – *thrice-* rejected by the Commission – regarding the alleged deficiency of DIRECTV's Hawaii service packages relative to those offered to U.S. mainland subscribers. In order to avoid a complete

¹ DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, LLC, which is a Commission licensee in the DBS service and a wholly-owned subsidiary of Hughes Electronics Corporation.

² See Public Notice, *Media Bureau Action, Request for Comment on Petitions Regarding DIRECTV's DBS Service to the States of Alaska and Hawaii*, DA 03-862, MB Docket No. 03-82 (Media Bur. rel. Mar. 25, 2003).

³ Hawaii Petition at 2

duplication of the allegations in its prior filings, Hawaii also includes a newly-minted charge that DIRECTV is deliberately refusing to make available DBS reception equipment to Hawaiian subscribers, and then adds a truly outrageous twist – asking the Commission to penalize DIRECTV with unspecified “administrative sanctions” for allegedly flouting the Commission’s geographic service requirements.

In this Opposition, DIRECTV again urges the Commission to reject Hawaii’s claims in their entirety. The Commission has recognized that Hawaii is at the “geographic extreme” of the service area defined by DBS satellite antenna coverage patterns: and poses significant technical and economic service challenges to DBS operators. Unfortunately, Hawaii adamantly and unreasonably refuses to acknowledge the progress that DBS providers have made to date in overcoming these challenges to offer Hawaiian subscribers an alternative to their incumbent cable television service. Hawaii also deliberately ignores the fact that, in spite of the formidable challenges involved in providing DBS service to the islands, service to Hawaiian subscribers has continuously improved – and further improvements are on the horizon. Among the examples of Hawaii’s cognitive dissonance:

- Hawaii ignores the fact that DIRECTV has developed four programming packages for Hawaii that in fact offer customers access to at least 110 channels, including a wide variety of Spanish-language channels, and a variety of pay-per-view and premium movie service channels;
- Hawaii ignores DIRECTV’s efforts, beginning with the launch of DIRECTV 1R in 1999, to design the CONUS capacity on *all* of its CONUS DBS satellites with Hawaii coverage;

⁴ Policies and Rules for the Direct Broadcast Satellite Service, Report and Order, **1B** Docket No. 98-21 (rel. June 13, 2002) (“DBS Rules Order”), at ¶ 80.

- Hawaii ignores the fact that Hawaiian DIRECTV subscribers are afforded *more favorable* access to and pricing of certain premium channels than mainland DBS subscribers;
- Hawaii ignores the significant addition of new programming to DIRECTV's Hawaii program packages since service was introduced to the islands, including most recently access to the popular NFL Sunday Ticket offering; and
- Hawaii ignores DIRECTV's repeated and proven commitment – evidenced by its service efforts to date – to upgrade its DBS service to Hawaiian consumers.

Indeed, as set forth below, DIRECTV is actively working on several potential options to continue to improve Hawaiian DBS service.

Hawaii's new allegation that DIRECTV "refuses to make available" consumer reception equipment in Hawaii is completely inconsistent with the efforts that DIRECTV has taken to date to introduce DBS service to Hawaiian subscribers. It also is demonstrably false. As a threshold matter, to be clear, DIRECTV is not a vertically integrated equipment manufacturer or vendor. DIRECTV's DBS receiving equipment in the United States, including Hawaii, is manufactured by authorized third party consumer electronics manufacturers (based on specifications provided to them by DIRECTV), and sold by authorized satellite television and consumer electronics retailers, based on orders placed by these retailers to the manufacturers. DIRECTV does not and cannot control the inventory and buying decisions of its authorized third party retailers, including retailers located on the Hawaiian islands.

Nevertheless, there is no question that DIRECTV has made extensive efforts to ensure that its product is "made available" to Hawaiian retailers: DIRECTV has authorized the manufacture of receiving equipment (including a larger receive antenna) designed *specifically* to

serve Hawaiian subscribers; has specifically authorized a number of retailers to sell DIRECTV service and equipment on the islands; and, to the extent that DIRECTV compensates its retailers in connection with their activities in selling DIRECTV service, it does so for Hawaiian retailers on *exactly* the same terms and conditions as retailers located on the mainland. Furthermore, DIRECTV has independently confirmed with several of its authorized retailers in Hawaii that they are indeed actively selling DIRECTV products on the islands – meaning that Hawaii’s statements that “there are no local retailers in Hawaii that carry DIRECTV’s service” and that “DIRECTV’s service is entirely unavailable to consumers in the State”⁵ are flatly wrong.

As a legal and policy matter, Hawaii’s petition also continues to mischaracterize the scope and extent of the DBS geographic service obligation. Last year, the Commission issued comprehensive revisions to its DBS service rules, including a fresh consideration of DBS provider geographic service requirements. In conducting that analysis, the Commission found that “market forces will continue to provide some incentive for DBS service providers to reach more potential customers in new markets through geographic expansion,” and specifically found, “[r]ecognizing that DBS licensees are now serving Alaska and Hawaii, . . . that our existing geographic service rules are successfully promoting service to these traditionally underserved areas.”⁶ The Commission thus left the text of its geographic service requirement essentially unchanged – a DBS provider must “provide DBS service to Alaska and Hawaii where such service is technically feasible from the authorized orbital location.”⁷

⁵ Hawaii Petition at 5.

⁶ *DBS Rules Order* at ¶ 59.

⁷ See 47 C.F.R. § 25.148(c). The Commission also will not require service to Alaska and Hawaii, which, although technically feasible “would require so many compromises in satellite design and operation as to make it economically unreasonable.” *Id.*

In addressing the specific geographic service concern raised by Hawaii regarding the level of DBS service that must be provided to the islands – the identical concern that Hawaii repeats here – the Commission concluded that, “[i]n an effort to balance requirements to provide service to all 50 states, and in order to avoid dictating system design or business plans,” it should not “specifically define what constitutes full or comparable” DBS service.⁸ The Commission expressed an understandable reluctance to be placed in the position of “conducting a program-by-program content comparison of service offerings” between Hawaii and the mainland, noting that this could have First Amendment implications.’ The Commission similarly decided that it would not “mandate rules concerning the equivalent cost of equipment or service offerings.”’ The Commission did, however, clarify its expectation that DBS operators must offer packages of services in Alaska and Hawaii “that are reasonably comparable to what they offer in the contiguous 48 states.”’

The Commission should find that, in view of the technical and economic challenges of providing service to Hawaii, DIRECTV’s Hawaii DBS offerings are indeed, “reasonably comparable” to the DBS service offered to mainland subscribers, especially in view of the continuing improvements in service that have been and that are still taking place. In its initial comments in the DBS service rules proceeding more than three years ago – when there was *no* DBS service to Hawaii at all – DIRECTV expressed the view that the Commission’s current geographic service rules were sufficient to ensure that DBS service would become a reality for potential subscribers in Hawaii. *That prediction has come true.* Today, both EchoStar and

⁸ *DBS Rules Order* at ¶ 65.

⁹ *Id.* at ¶ 70.

¹⁰ *Id.*

¹¹ *Id.* at ¶ 65.

DIRECTV serve Hawaii with attractive packages of DBS programming. In DIRECTV's case, the Commission observed in connection with the launch of DIRECTV's initial Hawaii Choice offering that it included "a choice of over 110 programming choices, which DIRECTV expects to expand." While it is true that, for reasons of technical feasibility, there are limits to DIRECTV's current signal coverage of Hawaii due to the design of the first DIRECTV DBS satellites, DIRECTV nonetheless has indeed expanded its Hawaii service offerings and packages, and as mentioned, expects to do more in the future.

Market forces, in conjunction with the Commission's existing geographic service requirements, have resulted and will continue to result in the natural and efficient geographic expansion of DBS service to Hawaii. Hawaii's repeated attempts to manufacture more draconian geographic coverage requirements are over-regulatory and unnecessary. **And** on the question of imposing "administrative sanctions," the Commission should instead examine whether Hawaii's petition itself calls for the imposition of penalties on the State for abusing the Commission's processes. While Hawaii is within its rights to call for an examination of DIRECTV's compliance with geographic service rules, it cannot to do so incessantly or indefinitely through the filing of ill-conceived, frivolous filings that continually disparage the DIRECTV service, and that demand the expenditure of significant time and resources in response. The Commission has already considered and rejected Hawaii's arguments in three separate proceedings; the Commission should do so again here.

¹² In the Matter of DIRECTV Enterprises, Inc.; Application for Authority to Launch and Operate a Direct Broadcast Satellite Service Station, *Order and Authorization*, SAT-LOA-20000505-00086 (rel. Nov. 24, 2000), at ¶ 11.

Finally, DIRECTV also addresses the allegations contained in two petitions filed by Micocom, an Alaskan DBS distributor, that have also raised Alaska and Hawaii service issues. DIRECTV respectfully requests that the Commission dismiss these petitions, as well.

11. DIRECTV HAS MADE CONSISTENT STRIDES TO PROVIDE REASONABLY COMPARABLE PROGRAMMING TO HAWAII TO THE EXTENT TECHNICALLY FEASIBLE AND IN CONFORMANCE WITH COMMISSION REGULATIONS

In its 1995 *DBS Auction Order*, the Commission first promulgated regulations to require that DBS providers serve Alaska and Hawaii where technically feasible.¹³ From the start, DIRECTV has recognized the importance of providing quality service to the states of Alaska and Hawaii and was an early supporter of the Commission's efforts to promote these service goals.¹⁴ DIRECTV worked steadily towards the goal of commencing services in Hawaii and, beginning in 1999, DIRECTV overcame substantial technical barriers and commenced service to Hawaii in compliance with Commission regulations.¹⁵

Contrary to Hawaii's protests, today, DIRECTV offers attractive packages of DBS programming to the state of Hawaii: proof that the Commission's geographic service rules are working. Specifically, while it is true that there are limits to DIRECTV's current signal coverage of Hawaii – only three satellites to date, DIRECTV 1R, DIRECTV 5, and the CONUS capacity on the DIRECTV 4S spot beam satellite, can reach Hawaii – DIRECTV has developed

¹³ *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 9712 (1995) (“*DBS Auction Order*”).

¹⁴ *See Id.* ¶ 126 (noting that DIRECTV was among the supporters of the Commission's proposed geographic service requirements rules).

¹⁵ DIRECTV currently provides programming packages to Alaska that are identical programming packages offered to subscribers in the mainland United States. The only difference is that receipt of these packages in Alaska generally requires a larger satellite dish. As neither the State of Hawaii nor Microcom alleges otherwise, DIRECTV does not further address herein any alleged disparity in DIRECTV's provision of programming to Alaska.

four programming packages for Hawaii that in fact offer customers access to more than 110 channels, including a wide variety of Spanish-language channels, pay-per-view and premium movie service channels.¹⁶ The two main programming packages and additional premium services include:¹⁷

- **Hawaii Choice Plus** - \$21.99 per month: Offering 47 popular channels including: American Movie Classics (AMC), Animal Planet, Biography Channel, Boomerang, Bravo, Comedy Central, Court TV, C-Span2, Discovery Kids, Disney West, Do-It-Yourself Network (DIY), E! Entertainment Television, Food Network, Fox News, Fox Sports Net West, Fox Sports Net West **11**, FX, Galavision, Hallmark, History Channel, Home and Garden Television (HGTV), Home Shopping Network, Independent Film Channel, The Learning Channel (TLC), Lifetime, MSNBC, MTV, MTV2, Nickelodeon West, Noggin, Oxygen, PAX TV, PBS Kids, QVC, Sci-Fi, SoapNet, Speed Channel, Toon Disney, Travel Channel, TV Land, Univision, and VH1. Among the 47 channels, Hawaii Choice Plus also includes two premium movie channels, STARZ! West and STARZ! **II** East, and one sports channel usually available only at an additional charge, The Golf Channel.
- **Opción Hawaii Plus** - \$23.99: Offers 59 popular channels, including 36 of the Hawaii Choice services plus 22 Spanish-language channels, including Cine Latino, CNN Espanol, Canal Sur, Discovery en Espanol, Fox Sports World en Espanol, GEMS TV, Utilisima, MTV S, Music Choice (7) PUMA TV, TV Chile, Weather Channel/Canal del Tiempo, TELEMUNDO East and West, TELEMUNDO International (news), TVE and Univision West. Also among the 59 channels, Opcion Hawaii Plus includes a premium movie channel, STARZ! West, and one sports channel usually available only at an additional charge, The Golf Channel.
- **Premium movie channel packages include:** HBO/SHOWTIME (16 channels) - \$17.00, HBO (7 channels) - \$9, SHOWTIME (9 channels) - \$9 and PLAYBOY - \$15.99.
- **Other channels include:** Twelve public interest channels (free) and nine pay-per-view channels.

¹⁶ DIRECTV notes that at the time it launched service in Hawaii, the channel capacity on the various cable systems serving the islands ranged from 36 to 78 programming channels. DIRECTV's Hawaii packages thus have compared quite favorably to those offered by the dominant cable presence on the islands.

¹⁷ DIRECTV also offers Hawaii Choice (\$19.99) and Opción Hawaii (\$21.99), which do not include the STARZ! movie channels. These packages are not as heavily marketed as the Hawaii Choice Plus and Opción Hawaii Plus packages, discussed above.

In addition, DIRECTV significantly bolstered its offerings by adding the NFL Sunday Ticket to its premium programming choices in Hawaii beginning with the 2002 NFL season, as well as adding Telefe and HBO Latino to its Opción Hawaii Plus packages in October, 2001.

The Hawaii Petition includes numerous inaccuracies in its surprising attempts to scorn DIRECTV's efforts. First, Hawaii claims that Hawaii Choice Plus includes 44 channels for \$21.99 per month – it actually includes 47 channels – and claims Opcion Hawaii Plus includes 54 channels for \$23.99 per month – it actually includes 59 channels.¹⁸ Second, Hawaii is incorrect when it claims that DIRECTV's programming packages offered to Hawaii “compare unfavorably on a pure ‘price per channel’ basis with Directv’s primary Mainland offerings.”” While the Hawaii Petition correctly points out that the Hawaii Choice Plus’s 47 channels calculates to approximately \$0.50 per channel (it is actually slightly less than \$0.47 per channel), the comparison to Total Choice Plus, although the names sound alike, is simply not valid.²⁰ This is not an “apples to apples” comparison. Hawaii Choice Plus compares very favorably to DIRECTV's Select Choice package, a more comparable mainland offering, which includes 40 channels for \$26.99, or \$0.67 per channel.

Hawaii's price-per-channel allegation is without merit for yet another reason: Hawaii Choice Plus includes certain premium channels at *no* extra charge and DIRECTV offers additional premium movie channels available to Hawaii residents at a significant discount compared to the price offered on the mainland. This fact also significantly mitigates Hawaii's

¹⁸ See <http://www.directv.com/DTVAPP/learn/HawaiiChannels.jsp> (these numbers include the Independent Film Channel, which is not listed on the web site).

¹⁹ Hawaii Petition at 5.

²⁰ The Hawaii Petition also misstates the per channel price of the Total Choice Plus package. It actually has more channels (90, not 84) and has a higher retail price (\$37.99, not \$31.99). Thus, the per channel price is \$0.42 and not \$0.37 per channel.

separate allegation that Hawaiian residents are disadvantaged because Hawaii does not receive certain “popular” channels?’ As part of the \$21.99 base price, Hawaii Choice Plus *includes* two premium movie channels, STARZ! West and STARZ! II East, as well as The Golf Channel, which is available on the mainland generally only for an extra charge a la carte or as part of the Premium Sports Pack. It would cost a customer on the mainland approximately \$19.00 to add these premium programming options to the Select Choice, Total Choice or Total Choice Plus packages, which are included with Hawaii Choice Plus *gratis*.

Further, DIRECTV offers a deep discount to Hawaii residents on additional premium movie channels. For example, DIRECTV offers HBO, Showtime or Cinemax for \$12.00 to mainland subscribers, but for only \$9.00 to Hawaii residents, and any combination of two of these premium movie channel packages for \$22.00 to the mainland, but for only \$17.00 to Hawaii. This approximately 30 percent discount on premium channels should not be overlooked, especially considering the massive appeal of HBO’s “must-have” programming (to use Hawaii’s ~~em~~)’ such as the *Sex in the City*, *The Sopranos*, and *Six Feet Under*.

Thus, the Commission should reject Hawaii’s simplistic analysis of DIRECTV’s Hawaii service package offerings. Hawaii asks the Commission to engage in *precisely* the “program-by-program” content comparison that the Commission has wisely resisted, and indeed, expressly stated that it would not conduct²³ in evaluating the level of DBS service provided to Hawaii. Nonetheless, such an evaluation yields the conclusion that DIRECTV is in ample compliance with the Commission’s requirements to serve Hawaii. DIRECTV offers a valuable service to the residents of Hawaii that provides a better value to these subscribers in certain important respects

²¹ Hawaii Petition at 6.

²² *See id.* at 8.

²³ *DBS Rules Order* at ¶ 71.

than is received by mainland subscribers. And as discussed below, DIRECTV is continually looking for ways to expand its service offerings to the islands,

III. DIRECTV EXPECTS FURTHER EXPANSION OF CHANNEL OFFERINGS AND IMPROVEMENTS TO HAWAII SERVICE

Four years ago, it was not technically feasible for DIRECTV to provide video programming services to Hawaii. Today, DIRECTV provides a wide array of programming choices to Hawaii residents at competitive, often favorable, prices compared to those that it offers to the mainland. DIRECTV does not dispute that the programming choices offered to Hawaiian residents are more constrained than those offered to the mainland, but DIRECTV submits that it offers the most expansive programming that is technically and economically feasible at this time.

As noted above, only three of DIRECTV's satellites can reach Hawaii. Using 18 out of the 32 transponders that are technically able to serve Hawaii from the 101" orbital location and the 11 transponders that can serve Hawaii from the 119° orbital location, DIRECTV has done its best to provide service to Hawaii, and DIRECTV is committed to continued improvement and expansion of this service.

DIRECTV has already improved its programming in Hawaii by adding program channels and service offerings, most recently by adding the NFL Sunday Ticket. In the future, all new and replacement DIRECTV CONUS satellites will be capable of serving Hawaii from DIRECTV's CONUS locations, **and** these new satellites will make it technically feasible for DIRECTV to increase service offerings to Hawaii. For example, once the DIRECTV 7S satellite is launched at the end of this year into the 119° W.L. orbital position, it should be possible to relocate another satellite to 101" W.L. so that Hawaii's service packages. Alternatively (or in addition) DIRECTV may acquire additional satellite capacity that will allow it to enhance its service to

Hawaii. Hawaii has proffered no evidence to contradict DIRECTV's track record of steadily improving service to the islands, **or** any basis to doubt that DIRECTV will pursue such proposals. Indeed, the Commission has reiterated recently its desire to "avoid dictating system design or business plans" to DBS providers,²⁴ and there is absolutely no ground to do so here with respect to Hawaii service.

Nor is it in the public interest to have Hawaii micromanage DBS programming decisions when Hawaii is neither familiar with nor subject to any of the significant technical or economic risks confronted by DIRECTV. **For** example, the Hawaii Petition states that DIRECTV could "include all of the ten most popular cable programming channels . . . [by moving this programming] from its older satellites at 101° W.L. to its new satellites at the same location."²⁵ DIRECTV does not dispute that it has the technical capability of moving certain programming channels from DIRECTV 2 to DIRECTV 1R, but, unfortunately, this partial solution to enhancing Hawaii service is not economically feasible at this time. The programming on the DIRECTV 1R satellite is currently the subject of imminent litigation with the National Rural Telecommunications Cooperative ("NRTC"). When the NRTC litigation is resolved, DIRECTV will have the ability to consider this option, and indeed, if the litigation is resolved in DIRECTV's favor, DIRECTV *hereby commits to pursue adjusting its lineup so as to make even more programming available to Hawaiian subscribers.*

Specifically, NRTC distributes certain DIRECTV DBS services through its members and affiliates in designated geographic areas. Under the terms of the NRTC contract, these

²⁴ *DBS Rules Order* at ¶ 65.

²⁵ Hawaii Petition at 12.

distribution rights are tied to the fuel life of the DIRECTV 1 satellite,²⁶ but DIRECTV 1 suffered a failure of its primary spacecraft control processor on July 4, 1998. DIRECTV has since relocated this satellite to operate at the 110° W.L. orbital location, so that the delivery of a significant portion of programming viewed by the largest number of subscribers would not be on a satellite operating only on its back-up control processor. NRTC apparently viewed the reassignment of DIRECTV 1 as an opportunity to extend the term of its distribution rights. NRTC has since disavowed the contractual link to DIRECTV 1 and instead has offered shifting and inconsistent positions in its litigation with DIRECTV regarding which “satellite” it contends should now measure the term of its contract.

One of the many positions NRTC has taken in the litigation is that whichever satellite transmits twenty-two defined “Programming Services” is the satellite by which the NRTC contract term is measured.” Currently, the Programming Services are transmitted on DIRECTV 2, a satellite of the same generation as DIRECTV 1, launched in 1994 with an estimated fuel life that is within approximately **two** years of the range of the estimated fuel life for DIRECTV 1. If DIRECTV moves any of these twenty-two services to the newer generation satellite DIRECTV 1R, **as** suggested in the Hawaii Petition, DIRECTV exposes itself to unwarranted claims that it has changed the satellite that measures the NRTC contract term from an older generation satellite to DIRECTV 1R. Such a claim, if successful, would have a severe economic impact on DIRECTV by extending the NRTC contract term beyond the expected end of fuel life of

²⁶ DIRECTV 1 is the initial satellite on which DIRECTV’s DBS service (and the NRTC contract) commenced.

²¹ These services are: A&E, Cartoon Network, CNBC, CNN, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, Weather Channel, WTBS, PBS Affiliate, ABC Affiliate, CBS Affiliate, Fox Affiliate and NBC Affiliate.

DIRECTV 1 in approximately 2009 to the end of fuel life of DIRECTV 1R, which may continue through 2024.

In light of this litigation, moving any of the twenty-two “Programming Services” onto DIRECTV 1R at this time would create risk for DIRECTV in the current NRTC litigation, which could in turn subject DIRECTV to substantial economic exposure. Any action DIRECTV takes with respect to the twenty-two Programming Services would necessarily expose DIRECTV to new threats and accusations by NRTC and would alter the facts now subject to dispute in the litigation. Beyond the economic risk associated with moving the Programming Services to DIRECTV 1R prior to resolution of the NRTC litigation, the very act of doing so would likely delay resolution of the dispute, extending the costs and uncertainty associated with prolonged participation in the litigation.

The NRTC litigation is set for trial on June 3, 2003, and its conclusion should result in a declaratory judgment regarding which satellite measures the term of the NRTC contract. When there is a final resolution, DIRECTV will have more flexibility regarding the placement of programming on its various satellites without the constraints (and economic exposure) of litigation.

Therefore, Hawaii is incorrect when it claims that DIRECTV’s claims of formidable technical and economic challenges are “completely unfounded.”²⁸ These technical and economic challenges exist, but DIRECTV is working diligently to overcome them. Indeed, subject to the outcome of the NRTC litigation, Hawaiian subscribers *could in the near term acquire up to*

²⁸ Hawaii Petition at **12**.

*twenty-two additional programming services in their service packages*²⁹ – and DIRECTV will make every effort to prevail in the NRTC litigation and to provide for this result. In the longer term, there is no question that service to Hawaiian subscribers will improve as DIRECTV replaces its CONUS satellites, and/or acquires additional capacity that can be used for Hawaii service. Hawaii thus should be applauding – rather than disparaging – DIRECTV’s efforts on this score.

IV. LONG-STANDING COMMISSION PRECEDENT DEMONSTRATES THAT DIRECTV IS IN COMPLIANCE WITH THE COMMISSION’S GEOGRAPHIC SERVICE RULES

A. The Commission Has Consistently Found Nearly Identical Claims by Hawaii to Be Without Merit

Despite DIRECTV’s efforts to provide quality DBS service to Hawaii residents, Hawaii has voiced at every opportunity its dissatisfaction that DIRECTV’s service to Hawaii is not *identical* to the service DIRECTV offers to the mainland. Each time Hawaii has brought its allegations to the Commission, however, the Commission has held in DIRECTV’s favor.

The Commission first dealt with Hawaii’s allegations in a November 2000 order granting DIRECTV authority to launch and operate DIRECTV 5.³⁰ In the *DIRECTV 5 Order*, in response to Hawaii’s allegations, the Commission found that DIRECTV had made great strides in bringing service to Hawaii, stating, “[W]e note that DIRECTV has initiated service to Hawaii. Although Hawaiian subscribers will not be offered the same programming package as CONUS

²⁹ DIRECTV notes that these twenty-two additional services include much of the programming that Hawaii complains is currently lacking in DIRECTV’s Hawaii service packages. *See* Hawaii Petition at 6-7.

³⁰ *DIRECTV Enterprises, Inc. (For Authority to Launch and Operate a Direct Broadcast Satellite Service Space Station)*, 15 FCC Rcd 23630 (2000) (“*DIRECTV 5 Order*”).

subscribers, DIRECTV's initial offering includes a choice of over 110 programming choices, which DIRECTV expects to expand."³¹

Hawaii repeated nearly identical allegations the following year, in the context of DIRECTV's application to launch and operate the DIRECTV 4S spot beam satellite. Not surprisingly, in the *DIRECTV 4S Order*, the Commission once again rejected Hawaii's request." In denying Hawaii's request, the Commission referred to passages from the prior year's *DIRECTV 5 Order* to reject Hawaii's allegations.

Most recently, in its June 2002 *DBS Rules Order*, the Commission again considered and rejected the now-familiar claims of Hawaii. In the *DBS Rules Order* proceeding, Hawaii claimed in its comments:

[T]o comply with the Commission's geographic service rules, DBS providers must offer the same "core CONUS" programming to Hawaiians and Alaskans as is offered to Mainland subscribers. Hawaii urges the Commission to find that marginal niche programming is insufficient and . . . must be of equal value to that provided in CONUS.³³

Hawaii's claims here remain unchanged, and it follows that the Commission's consistent response over the last three years should also remain the same. As an initial matter, whether DIRECTV offers identical or strictly "comparable" service to Hawaii is not at issue, nor is it the legal standard. In each of its orders in 2000, 2001 and 2002, the Commission held in favor of DIRECTV while recognizing that "neither DBS provider offers a package of services to Alaska and Hawaii comparable to what the provider offers to CONUS."³⁴ Further, in the *DBS Rules Order*, the Commission "decline[d] to specifically define what constitutes full or comparable

³¹ *Id.* ¶ 11.

³² *DIRECTV Enterprises, Inc., Application to Launch and Operate a Direct Broadcast Satellite Service Space Station*, 16 FCC Rcd 1853 (2001) ("*DIRECTV 4S Order*").

³³ *Id.* ¶ 70.

³⁴ *DBS Rules Order* at ¶ 70; see *DIRECTV 5 Order* at ¶ 11; *DIRECTV 4S Order* at ¶ 11-12.

service” “[i]n an effort to balance requirements to provide service to all 50 states, and in order to avoid dictating system design or business plans.”³⁵

As to the specific issues raised in the Hawaii Petition – whether DIRECTV must make any particular channels available to Hawaii or do so at the same price-per-channel as offered to the mainland – the Commission found in its 2002 *DBS Rules Order*:

[such] proposals could place the Commission in the position of conducting a program-by-program content comparison of service offerings in Alaska and Hawaii and the Mainland, which could have First Amendment implications. Likewise, we will not mandate rules concerning equivalent cost of equipment or service offerings.³⁶

DIRECTV has developed special programming packages for Hawaii to provide service in Hawaii despite substantial technical and economic barriers. It has balanced the present infeasibility of providing to Hawaiian subscribers service that is identical to that of mainland subscribers by including certain premium services to Hawaii residents at no extra charge and certain others at a substantial discount. And in so doing, it is at least offering “reasonably comparable” service to the islands as expected by the Commission.³⁷ Just as it has at least three times before, the Commission should once again reject Hawaii’s claims.

B. The Commission’s 2002 Amendment to Its DBS Rules Did Not Change the Standard that DIRECTV Must Meet

As the Commission found in orders issued in 2000, 2001, and 2002, DIRECTV continues ‘to comply with the letter and spirit of the Commission’s geographic service requirements. In the *DBS Rules Order*, the Commission slightly revised the text of its geographic service rule, but did *not* change the substantive standard by which it determines compliance with its geographic

³⁵ *DBS Rules Order* at ¶ 65.

³⁶ *Id.* ¶ 71.

³⁷ *Id.* at ¶ 72.

service regulation. The rule continues to require that DBS providers “provide DBS service to Alaska and Hawaii where such service is technically feasible from the authorized orbital

The new rule specifies further that, even where technically feasible, a carrier is not required to provide service to Alaska or Hawaii if “such services would require so many compromises in satellite design and operation as to make it economically unreasonable.”³⁹ Although not included in the text of the original rule, this standard has been in place since the rule’s inception in 1995. As stated in the 1995 *DBS Auction Order*, “Any party acquiring channels at [101°] that desires not to provide service to Alaska or Hawaii will bear the burden of showing that such service is not feasible as a technical matter, or that while technically feasible such service would require so many compromises in satellite design and operation as to make it economically unreasonable.”⁴⁰ Thus, the Commission’s rules are the same today as they were each of the last three times that the Commission rejected Hawaii’s claims.

Hawaii places great emphasis on the Commission’s statement that “DBS operators must offer packages of services in Alaska and Hawaii that are reasonably comparable to what they offer in the contiguous 48 states.”⁴¹ The Commission, however, recognized in a footnote to this statement that “[t]his requirement is subject to the technical feasibility provisions of new § 25.148(c).”⁴² DIRECTV has demonstrated that it currently provides, and intends to expand, its service to Hawaii to the extent economically reasonable and technically feasible. Given the

³⁸ 47 C.F.R. § 100.53(b) (2001); 47 C.F.R. § 25.148(c) (2002).

³⁹ 47 C.F.R. § 25.148(c).

⁴⁰ *DBS Auction Order* at ¶ 128.

⁴¹ Hawaii Petition at 5 (quoting *DBS Rules Order* at ¶ 71).

⁴² *DBS Rules Order* at n.254.

technical and economic limitations discussed above, DIRECTV is in full compliance with the Commission's rules.

V. DIRECTV DOES NOT DISCRIMINATE AGAINST HAWAII RETAILERS

Hawaii's claim that "DIRECTV is in violation of the Commission's rules by refusing to make available in Hawaii consumer reception equipment" also is without basis.

As a threshold matter, to be clear, DIRECTV is not a vertically integrated equipment manufacturer or vendor. DIRECTV's DBS receiving equipment in the United States, including Hawaii, is manufactured by authorized third party consumer electronics manufacturers (based on specifications provided to them by DIRECTV), and sold by authorized satellite television and consumer electronics retailers, based on orders placed by these retailers to the manufacturers.⁴³ DIRECTV does not and cannot control the inventory and buying decisions of its authorized third party retailers, including retailers located on the Hawaiian islands.

Nonetheless, there is no question that DIRECTV has made extensive efforts to ensure that its product is "made available" to Hawaiian retailers and customers: DIRECTV has created and markets special packages of programming services intended specifically serve Hawaiian subscribers; authorized the manufacture of receiving equipment (including a larger receive antenna) designed specifically to serve Hawaiian subscribers; has authorized a number of retailers to sell DIRECTV service and equipment on the islands; and, to the extent that DIRECTV compensates its retailers in connection with their activities in selling DIRECTV

⁴³ DIRECTV has recently begun to sell receiving equipment via the DIRECTV web site, but because service to Hawaii involves the purchase of special equipment (*i.e.*, a somewhat larger dish), Hawaiian customers must purchase the service through an authorized retailer. Hawaii does appear to have identified an error in DIRECTV's web site store locator function. Having been made aware of the incorrect information on its web site, DIRECTV will remedy this issue to facilitate Hawaii consumers' ability to purchase DIRECTV service.

service, DIRECTV does so for Hawaiian retailers on *exactly* the same terms and conditions as retailers located on the mainland.

DIRECTV has neither the desire, nor the business incentive, nor the ability to discriminate against Hawaiian retailers. Furthermore, contrary to Hawaii's claims, DIRECTV has independently verified that DIRECTV receiving equipment is actively being sold at various Hawaiian retail stores, including Dish Hawaii and Harmer Communications. And DIRECTV is also pleased to note that additional authorized retailers, including Mountain Satellite, will soon also expand their operations and commence sales and installations of DIRECTV equipment in Hawaii. Hawaii's allegation that there "are no local retailers in Hawaii that carry DIRECTV's service" is simply untrue.

VI. THE REMAINING ALLEGATIONS RAISED BY MICROCOM ARE ALSO WITHOUT BASIS

Microcom has proffered several additional allegations that similarly lack merit.

DIRECTV will discuss these remaining claims in turn.

First, Microcom claims that, "the latest generation of DIRECTV receivers" does not include Hawaiian zip codes 96713 and 96732 or Alaska zip code 99501 for elevation and azimuth.⁴⁴ However, a review of the "latest generation of DIRECTV receivers" in fact reveals otherwise. The latest generation of receivers from RCA, Samsung, Philips, Zenith/Sony, and Tivo each support all three zip codes.

Microcom is correct that a small minority of current-generation receivers do not support these zip codes (*e.g.*, HNS Gaebo/Sony **B65** (MPG)), but these are the exception. Furthermore, DIRECTV has already taken steps to ensure that *all* future receivers will utilize data developed by DIRECTV that includes Alaska and Hawaii. In the past, the zip code database used for

⁴⁴ See Microcom Hawaii Request, at **2**; Microcom Alaska Request, at 2.

antenna pointing was implemented by the individual manufacturers. DIRECTV has since developed a centralized database that includes these Alaska and Hawaii zip codes, which manufacturers will incorporate into all new DIRECTV receivers.⁴⁵

Second, Microcom claims that “many” of DIRECTV’s published consumer toll free numbers are not accessible from area code 808 (Hawaii) or 907 (Alaska) area codes.⁴⁶ This is not correct. In both Alaska and Hawaii, DIRECTV has designed its service so that customers calling from area codes 808 or 907 can dial the same toll free numbers as customers within the continental United States. The fact is that customers in Alaska and Hawaii can call any DIRECTV toll free number **24** hours a day, seven days a week and obtain customer service.

Third, Microcom states in its Alaska pleading that DIRECTV “does not have programming packages tailored to provide the programming available on the largest economically viable consumer satellite dish (1.8 meters). A consumer’s only choice is to buy a package for which they will not receive all the programming.”⁴⁷ DIRECTV does not understand this vague and unsupported allegation. Consumers in Alaska that can access the DIRECTV service have access to *all* of the DIRECTV programming packages offered to CONUS subscribers, albeit using a larger dish. To the extent that Microcom is asking for additional “tailoring” of DIRECTV service packages to reduce satellite dish size, DIRECTV is unsure as to how this could be accomplished as a matter of physics without fundamentally altering the entire DIRECTV service, and Microcom offers no specifics as to what it has in mind.

Finally, Microcom claims that DIRECTV service requires a 1.2 meter dish in Hawaii. This also is not the case. DIRECTV has performed extensive testing on antennas throughout

⁴⁵ DIRECTV notes that installations in Alaska and Hawaii are professional-only, due to the larger custom antenna needed to receive programming in these states.

⁴⁶ *See* Microcom Hawaii Request, at 2; Microcom Alaska Request, at **2**.

⁴⁷ Microcom Alaska Request at **2**.

Hawaii (from the northern most island, Kauai, to the southern most location on the island of Hawaii), and determined that 0.75 meter and 0.84 meter dish-size both provided acceptable performance in all locations. To provide some rain fade margin, DIRECTV recommends using the larger of the two, the 0.84 meter dish. A 1.2 meter dish will of course also work, but is far larger than necessary. Thus, Microcom's allegations do not raise any issues under the Commission's DBS geographic service rules, and should be rejected.

VII. THE COMMISSION SHOULD REPUDIATE HAWAII'S SPURIOUS CALL FOR ADMINISTRATIVE SANCTIONS

DIRECTV has demonstrated that it is in compliance with the Commission's geographic service rules. Although Hawaii states that DIRECTV "has been warned repeatedly of its obligations to provide DBS service to consumers,"⁴⁸ to the contrary, the Commission has repeatedly recognized the efforts and progress made by DLRECTV in its service to Alaska and Hawaii and repeatedly *denied* nearly identical requests by Hawaii to penalize DIRECTV in light of DIRECTV's continued compliance with Commission rules. In this regard, it is Hawaii, and not DIRECTV, that may be vulnerable to sanctions and a charge of abusing Commission's processes through the filing of frivolous pleadings that raise identical issues.

DIRECTV has acted in good faith to comply with the Commission's geographic service rules and to provide service to Alaska and Hawaii in accord with the Commission's guidance imparted in the *DBS Auction Order*, the *DIRECTV 5 Order*, the *DIRECTV 4S Order*, and the recent *DBS Rules Order*. If the Commission decides to part with its earlier decisions and standards and finds in this proceeding that DIRECTV's implementation of the Commission's geographic service requirements is no longer satisfactory, such an outcome plainly should not lead to sanctions. Indeed, the Commission has held that sanctions are inappropriate in cases such

⁴⁸ Hawaii Petition at 10.

as this, where finding of non-compliance with Commission geographic service rules would signal a change in Commission standards (or application of those standards).⁴⁹ There has been no basis shown to justify the imposition of sanctions on DIRECTV in this proceeding.

VIII. CONCLUSION

For the foregoing reasons, DIRECTV respectfully requests that the Commission deny the Hawaii Petition and the Microcom Petitions.

Respectfully submitted,

DIRECTV ENTERPRISES, INC.

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Dated: April 24, 2003


⁴⁹ See, e.g., *Lorilei Communications, Inc. d/b/a The Firm v. Harmon Cable Communications, St. Albans, West Virginia, For Leased Access Channels*, 12 FCC Rcd 13279 (1997) (“[B]ecause the . . . rules in effect at the time these matters initially arose were somewhat in **flux** and not completely familiar to most cable operators as well as programmers, we believe it would be inappropriate to impose monetary or administrative sanctions . . .”).

DECLARATION OF STEPHANIE CAMPBELL

I, Stephanie Campbell, on behalf of DIRECTV, Inc. ("DIRECTV"), hereby declare as follows:

1. I am Senior Vice President of Programming for DIRECTV. In that capacity, I am directly responsible for the negotiation and administration of agreements with suppliers of programming to allow that programming to be retransmitted as part of DIRECTV's direct broadcast satellite ("DBS") service. I am generally familiar with the technical and business issues surrounding DIRECTV's DBS service to the States of Alaska and Hawaii.
2. I have reviewed the foregoing Opposition, and the facts and propositions set forth therein are accurate to the best of my knowledge, information and belief.

I declare that the above statements are true and correct to the best of my knowledge, information and belief,


Stephanie Campbell
DIRECTV, Inc.

Dated April 24, 2003

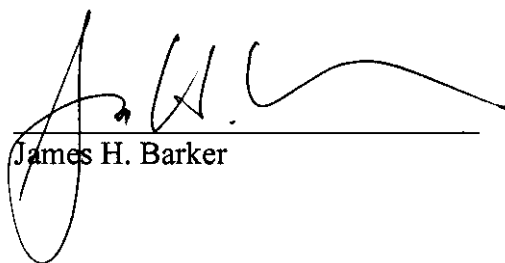
CERTIFICATE OF SERVICE

I, James H. Barker, certify that on this 24th day of April, 2003, a copy of the foregoing Opposition of DIRECTV, Inc. was sent by first-class mail, postage prepaid to the following parties:

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